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Supreme Court of the United States

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1964

No.....

MERCURY METALCRAFT COMPANY,
a Michigan Corporation,
Petitioner,

vs.

JOSEPH O. McCARTY,
Respondent

PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF MICHIGAN

Mercury Metalcraft Company, a Michigan Corporation petitioner, prays that a writ of certiorari issue from this Court to review the Opinions of the Supreme Court of the State of Michigan entered herein April 6, 1964 and September 2, 1964. Application for rehearing thereof was denied November 2, 1964.

OPINIONS BELOW

Opinions have been entered in this matter by the Circuit Court for the County of Macomb, State of Michigan, and the Supreme Court of the State of Michigan and are unreported except for 373 Michigan 567, as is shown below. Chronologically, said Opinions and pertinent Orders herein, with page references to the printed Appendix which is a part hereof, are as follows:

Circuit Court Opinion—November 7, 1961—(p. 13, *infra*)

Circuit Court Opinion on defendant's (petitioner's) Motion for New Trial—December 15, 1961—(p. 18, *infra*)

Supreme Court Opinion, reported in 373 Michigan Reports 567—April 6, 1964—(p. 22, *infra*)

Circuit Court "Supplemental Opinion"—August 5, 1964—(p. 30, *infra*)

Circuit Court Order extending petitioner's time until September 24, 1964, to apply for Leave to Appeal to Michigan Supreme Court—August 24, 1964—(p. 31, *infra*)

Supreme Court Opinion "On Remand"—September 2, 1964—(p. 31, *infra*)

Supreme Court Order granting petitioner 2 weeks from September 22, 1964, to apply for rehearing—September 23, 1964—(p. 32, *infra*)

Supreme Court Order denying rehearing—November 2, 1964—(p. 33, *infra*)

JURISDICTION

Judgment of $2175.08 was entered against petitioner by said Circuit Court on November 8, 1961 (p. 17), and affirmed by Michigan Supreme Court's Opinion "On Remand" on September 2, 1964 (p. 31, *infra*). Rehearing was denied November 2, 1964 by said Supreme Court.

Petitioner undertook appeal "as of right" by filing Claim of Appeal with the Michigan Supreme Court December 20, 1961, under the then-effective Supreme Court Rule 56, Sec. 1 (p. 5, *infra*), but has been denied the right to be heard on two determinative issues.

Michigan Supreme Court Opinion of April 6, 1964 (p. 22) remanded this case to Circuit Court for an additional factual finding, which Circuit Court rendered in "Supplemental Opinion" (p. 30) on August 5, 1964. Court Rule GCR 1963, 806.2 (p. 7) then in effect, required that petitioner obtain Leave to Appeal said opinion which petitioner was preparing and had 22 days remaining to file when Michigan Supreme Court affirmed judgment on September 2, 1964 (p. 31). Petitioner had not been notified that appeal was pending and was given no opportunity to be heard therein. Petitioner claims this constitutes denial of due process of law and so argued in its request for rehearing to Supreme Court. Jurisdiction of this Court is invoked under Article XIV, Sec. 1, United States Constitution.

Circuit Court stated that testimony "was not considered" in respect to one of petitioner's claims (Opinion p. 19, *infra*), hence there was no factual finding on that point which Supreme Court could consider and sustain. Michigan Supreme Court Opinion of April 6, 1964 (p. 28, *infra*) purports to uphold a "finding of fact" on said issue. This decision became final when Supreme Court affirmed judg-

ment September 2, 1964. Petitioner claimed that upholding a finding not before the Court on appeal constituted deprival of due process of law and urged said denial as a ground for requested rehearing which was denied. Jurisdiction of this Court is invoked under Article XIV, Sec. 1, United States Constitution.

QUESTIONS PRESENTED

May the Michigan Supreme Court undertake appeal of a Michigan Circuit Court Opinion—(1) on its own motion, (2) without notice thereof to the aggrieved party, (3) without affording the aggrieved party an opportunity to be heard, and (4) in circumvention of the aggrieved party's appeal—without depriving said party of due process of cess of law?

After petitioner has perfected general appeal "as of right", may the Michigan Supreme Court deprive petitioner right to appeal a factual finding made subsequent to said appeal without depriving petitioner of due process of law?

When a Michigan Circuit Court specifically held that it had "disregarded testimony" on an issue, may the Michigan Supreme Court, on appeal, invent and uphold a "factual finding" on that issue without depriving appellant of due process of law?

CONSTITUTIONAL PROVISIONS AND COURT RULES INVOLVED

United States Constitution, Amendment XIV, Sec. 1:

> "* * *; nor shall any State deprive any person of life, liberty, or property, without due process of law * * *."

State of Michigan Constitution, Article I, Sec. 17:

> "No person shall * * * be deprived of life, liberty or property, without due process of law * * *."

United States Supreme Court Rules, Part V. Jurisdiction on Writ of Certiorari, Rule 19.—Considerations Governing Review on Certiorari:

> "1. A review on writ of certiorari is not a matter of right, but of sound judicial discretion, and will be granted only where there are special and important reasons therefor. The following, while neither controlling nor fully measuring the court's discretion, indicate the character of reasons which will be considered."

Said rule 19, final provision of section 1 (b):

> "Where a court of appeals * * * has *so far departed from the accepted and usual course of judicial proceedings*, or so far sanctioned such a departure by a lower court, *as to call for an exercise of this court's power of supervision.*" (Emphasis added.)

Michigan Supreme Court Rule 56, Sec. 1 (effective until January 1, 1963):

> "Every appeal to the Supreme Court shall be taken by filing a claim of appeal with the court, tribunal or officer whose action is to be reviewed, and

paying the fee required by law for taking appeal. The Supreme Court shall thereupon have jurisdiction of the case. No such appeal shall be dismissed except on stipulation, on special motion and notice, or by the Supreme Court on its own motion."

Michigan Supreme Court Rule 60, Sec. 1 (effective until January 1, 1963):

> "*Leave to appeal* to the Supreme Court shall be *required in the following cases:*
>
> (a) Where such leave is expressly required by statute or rule;
>
> (b) Where the remedy of review, under statute, or in the absence of statute, under common law, is by certiorari, mandamus or other discretionary writ; or case made *unless the controversy involves more than $500;*
>
> (c) Where delayed appeal is sought.
>
> (d) Where, in an action at law submitted on the facts to court or jury, a judgment is rendered for the defendant, unless the trial judge shall certify that the controversy involved more than $500;
>
> (e) From the appointment of a receiver *pendente lite.*" (Emphasis added.)

GCR 1963, 806.2 (designation for Michigan Supreme Court's General Court Rule effective January 1, 1963):

> "Appeal by Leave. *Leave to appeal shall be required* in the following matters:
>
> (1) Final orders or judgments for money or property rights involving not in excess of $3000.00. (Emphasis added.)

GCR 1963, 14:

"Effective Date.

"*These rules will take effect on January 1, 1963. They govern* all proceedings in actions brought after that date and also *all further proceedings in actions then pending* except to the extent that in the opinion of the court their application in a particular action pending when the rules take effect would not be feasible, or would work injustice, in which event, the former procedure applies." (Emphasis added.)

GCR 1963, 806.1, Amendment adopted January 21, 1964:

"Appeal of Right. *In all criminal cases, defendant may appeal to the Supreme Court as a matter of right* from any conviction in the circuit, superior, and recorder's courts within the time limited by subrule 803.1, unless the trial in such court followed a trial in a lower court or tribunal for the same offense." (Emphasis added.)

GCR 1963, 806.2, Amendment adopted January 21, 1964:

"Appeal by Leave. *Except as provided in subrule 806.1, all appeals to the Supreme Court shall be by leave.*" (Emphasis added.)

Michigan Supreme Court Resolution of Adoption of January 21, 1964:

"Finding need for immediate action in view of the current effect of the Constitution of 1963, referring particularly to section 20 of article 1 thereof, the notice requirements of GCR 1963, 933 are eliminated in order that *all of the foregoing amendments to GCR 1963*, 518, 803, *806* and 807 may *go into effect March 1, 1964*. Such amendments will become effective accordingly as to all appeals claimed or applied for after such date, except that, as to appeals in criminal cases, they shall go into effect instanter. In case of difficulty caused by the

application of such amendments, as to appeals already commenced or contemplated at the time of adoption thereof, or in case of difficulty caused by the application of such amendments in any other regard, counsel may, by motion to the Supreme Court and upon such notice to other parties as the Court may direct, apply for solutional instructions." (Emphasis added.)

GCR 1963, 819.4:

"*Application for Rehearing.* No application for rehearing will be considered by the court unless the moving party, within 20 days from the filing of the opinion therein, causes any papers upon which it is based, together with his reasons for granting same, to be printed, and 24 copies thereof to be filed with the clerk of this court, and a copy thereof to be served upon the counsel for the opposite party. Proof of this service shall also be filed with the clerk. The party opposing may, within 10 days thereafter, file with the clerk 24 copies of his objections to the application, either printed or typewritten, as he may prefer; *the court will* then examine the papers and *without further argument*, unless specially ordered, will *pass upon the application.*" (Emphasis added.)

STATEMENT OF FACTS

Joseph O. McCarty (respondent) commenced suit in Macomb County Circuit Court (Michigan) claiming commissions under written contract with Mercury Metalcraft Company (petitioner). Petitioner claimed said contract contained a latent ambiguity and, in accord with the intent of the parties covered only prototype orders and did not control orders in question which were production orders. Circuit Court Opinion (p. 16) held the claimed oral agreement invalid, and after petitioner applied for New Trial,

Circuit Court Opinion of December 15, 1961 (p. 19) stated that testimony respecting ambiguity "was not considered", setting forth reasons of law.

On appeal, Michigan Supreme Court upheld petitioner's legal position that extrinsic evidence of latent ambiguity was admissible and should have been considered; but controlling this issue, held that Circuit Court had "found no such ambiguity" and upheld "such a finding of fact". Supreme Court also upheld petitioner's position that claimed oral agreement was valid, and remanded the case for a finding of fact by Circuit Court whether or not such agreement had been reached (p. 27 *et seq.*).

Circuit Court "Supplemental Opinion" of August 5, 1964 (p. 30) held no such agreement had been proved because proofs were equally balanced and petitioner failed to sustain its burden of proof. Petitioner was preparing appeal of this finding and had been granted until September 24, 1964 to file application for Leave to Appeal (p. 31, *infra*), when, without notice to petitioner that this matter was pending on appeal, and without affording petitioner an opportunity to be heard thereon, Michigan Supreme Court affirmed judgment in its Opinion "On Remand" (p. 31, *infra*).

Petitioner applied for rehearing to Michigan Supreme Court urging that said "On Remand" Opinion deprived petitioner of due process of law because of petitioner's lack of notice of a matter pending and lack of the fundamental right to be heard. Petitioner also urged that Supreme Court Opinion of April 6 deprived it of this constitutional guarantee by purporting to "uphold" a factual finding which had not been made and therefore was not before that Court for review; and further urged that depriving petitioner right to appeal said issues pursuant to Court Rules which were instituted after this appeal was pending, worked an injustice against petitioner.

The full text of the November 2, 1964, Order denying rehearing states:

> "In this cause an application for rehearing have been submitted, it is hereby DENIED."

REASONS FOR GRANTING THE WRIT

Petitioner submits the following reasons why this Court should issue a Writ of Certiorari to review Michigan Supreme Court's Opinions.

Without rights to appeal, trial courts would become despots and, in essence, courts of last resort. Right to fair trials can only be guaranteed through availability of a right to appeal, and appeal inconsistent with due process is a sham resulting in the same end. The scope of review exercised by Michigan Supreme Court herein made a mockery of justice and so far departed from the accepted and usual course of judicial review to call for an exercise of this Court's power of supervision.

Respondent claimed commissions under a written contract. If, as petitioner claimed, said contract did not cover same, due to a latent ambiguity therein, that fact would have been determinative of this case. Although petitioner sought determination of this matter, Michigan Supreme Court Opinion precluded such a determination. The Circuit (trial) Court explicitly did *not* consider testimony thereon. When the Supreme Court stated that Circuit Court *had made* a finding thereon, and then cut-off review of said purported finding, this issue was determined by Supreme Court's logistic circle and distortion of Circuit Court's explicit lack of finding. Justice and due process require that findings be *arrived at* from scrutiny of a case-made, not *invented by* mistatement of the trial court's position.

Circuit Court's finding, after appeal and remand, that petitioner failed to sustain its burden of proof that the parties had agreed to exclude orders in question from the written contract, also became determinative. Changed Court Rules, implemented by Supreme Court Opinions deprived petitioner appeal of this finding. Such deprivation violated due process of law. General appeal is not a game of chance whereby a litigant assumes the risk that issues available when appeal is commenced will remain determinative issues of the case.

Our judicial system is fundamentally adversary in nature, and it is elemental that the right to advocate is inherent thereto. The Supreme Court's Opinion "On Remand" consisted of a review by that court on its own motion, without notice of right to be heard, and in circumvention of petitioner's pursuit of appeal in accordance with existing court rules. It was based on no principle of adversary conflict. This Court stated in *Ochoa v. Morales* 230 U.S. 139, p. 161:

> "Whatever else may be uncertain about the definition of the term 'due process of law', all authorities agree that it inhibits the taking of one man's property and giving it to another, contrary to settled usages and modes of procedure, and without notice of an opportunity for a hearing."

See also *Honeyman v. Hanan*, 303 U.S. 377. In *Shelley v. Kraemer*, 334 U.S. 1, page 16, this Court stated:

> "Moreover, the protection of the Fourteenth Amendment against infringement by a state extends to the judicial as well as legislative action."

Also see *McDonald v. Mabee*, 243 U.S. 90, *Pennoyer v. Neff*, 95 U.S. 714, and *Griffin v. Griffin*, 327 U.S. 220, at page 228.

CONCLUSION

Determination of this case on appeal was founded upon one "finding" which in fact was never made, and upon one finding made subsequent to appeal, wherefore it is respectfully submitted that this Court exercise its supervisory powers and issue a writ of certiorari.

CASS S. JAROS and
MARJORIE S. JAROS,
Counsel for Petitioner,
Suite 1320, One Woodward Avenue,
Detroit 26, Michigan,
WOodward 2-6751.

APPENDIX

CIRCUIT COURT OPINION

(Filed November 7, 1961)

On or about October 30, 1958, the plaintiff agreed to perform certain services for the defendant corporation "as a sales engineer", for which services the defendant agreed to pay the plaintiff a commission of 5% on all orders secured by him and acceptable to the defendant corporation. This agreement was to become effective on April 30, 1958, and was to continue until cancelled by mutual consent or by sixty (60) days written notice given by the party desiring to cancel the contract to the other party. This contract also provided that all expenses incurred in the course of making sales were to be borne by the plaintiff. The contract further provided however, "should you feel that any situation warrants an exception (to the expense arrangement previously set forth) your requests will be given due consideration. Unless we have given authority to the contrary on such specific requests, however, we will not assume or pay any of your items of expense."

The testimony indicates that the plaintiff began working under the terms of this agreement, which relationship continued until on or about July 18, 1960, at which time the contract was terminated, the plaintiff sending to the defendant a letter of resignation. The testimony is conflicting on this point and while there is some testimony that the defendant felt the failure of the plaintiff to give sixty (60) days written notice constituted a breach of contract,

it would appear to the court that this question of breach of contract by the plaintiff is not material since no counter-claim for damages for breach of contract was filed by the defendant, the court therefore does not pass upon this question.

There is also testimony in the case and an issue raised as to whether or not the plaintiff was an "employee" of the defendant. The court does not feel that a determination of the legal relationship between the parties, that of employee and employer or independent contractor, is particularly material to the determination of the issue in the case and is therefore not determined by the court. The testimony also reveals that during the month of June 1960, the defendant corporation received certain orders from the General Motors Corporation, which orders totalled the sum of $38,853.51. The plaintiff claims that he is entitled to commissions of 5% on this amount. He also claims that he is entitled to the sum of $300.00 for three weeks work done in defendants' plant, and also to the sum of $232.41 for commissions due on certain work received and accepted by the defendant from the Buick Motor Division of General Motors. This last sum is admitted to be owed by the defendant. The defendant has filed a counter-claim in which he is seeking to recover the sum of $2613.38, the defendant having amended his counter-claim at trial to strike therefrom items of certain christmas gifts given to customers.

It is the defendant's contention that the plaintiff is not entitled to commissions on the $38,853.51 worth of sales accepted by the defendant from General Motors Corporation, because the orders in question were not of the type which the plaintiff was engaged to solicit since they pertained to production articles rather than proto-type arti-

cles upon which the profit is greater. It is also the defendant's contention that prior to the acceptance of these order from General Motors Corporation, the plaintiff was informed of this fact and that a subsequent oral agreement was entered into between the parties whereby the plaintiff agreed not to demand commissions for these orders and that he was given in lieu of such commissions certain accounts with Chrysler Corporation from which he had been previously expressly excluded. The testimony also shows that on or about October of 1959 the defendant had allowed and authorized the plaintiff to purchase gasoline and oil from the L & R Service at 23050 Groesbeck Highway, Warren, Michigan, and that the plaintiff did so purchase gasoline and oil on the account of the defendant corporation, which purchases were paid for by the defendant and total $523.30. The defendant in his counter-claim seeks reimbursement of this sum, together with rent of an office and telephone expenses. The testimony also clearly indicates that during the time that plaintiff was engaged in work for the defendant he received monthly statements of commissions earned and at no time was any charge made for rent, telephone or gasoline. The testimony also indicates that the gasoline bills paid by the defendant for gasoline and oil used in the plaintiff's automobile were in fact taken as an element of expense on the defendant's income tax returns, as were obviously all telephone bills.

It is therefore the opinion of the court that:

1. The testimony is diametrically opposed as to the subsequent oral agreement between the parties, or the lack thereof. However, since the alleged subsequent agreement is not in writing and not signed by the parties to be charged, in order to support such an agreement there

would have to be some individual consideration flowing from the defendant to the plaintiff. 26.978 M.S.A.; Turner v. Williams, 311 Mich 563; Smith v. Kelley, Maus & Co., 115 Mich 411; Barton v. Gray, 57 Mich 622.

2. As to the subsequent oral agreement, the defendant has the burden of proving its existence and that it is a valid contract by a preponderance of the evidence, this being in the nature of an affirmative defense.

The court is of the opinion that the defendant has not sustained this burden for the reason that, even assuming for the sake of argument, there was some kind of discussion of an agreement between the parties to forebear commissions from the General Motors orders, what was the consideration? The defendant says it was the turning over of the Chrysler accounts previously mentioned. However, according to the defendants own testimony, the conversations, out of which the subsequent oral agreement is supposed to have arisen, were held in the early part of 1960, and other undisputed testimony indicates that the Chrysler accounts were turned over to plaintiff in May of 1959. Obviously, if this is consideration at all it is past consideration and is of no force and effect to support a subsequent promise, Shirley v. Camden, 314 Mich 128. The court can only conclude therefore that the subsequent promise is of no force and effect; is not binding upon the plaintiff and the plaintiff is therefore entitled to recover the sum of $1942.67, the amount of commissions at 5% on $38853.51 worth of sales to General Motors Corporation in accordance with the written contract of the parties.

The plaintiff's claim for $300.00 for work done in the defendants plant however rests upon alleged extra work done by the plaintiff in and about the scheduling, cost pricing and follow up of orders to be furnished by outside vendors. That the plaintiff did perform these extra chores

is adamantly disputed by the defendant corporation through its general manager and its superintendent. The court is of the opinion that the plaintiff has failed to sustain his Burden of Proof as to the extra work done and his claim for $300.00 is therefore disallowed.

The plaintiff's claim of $232.41 for commissions due on work received and accepted by the defendant from the Buick Motors Division of the General Motors not being disputed, this amount is therefore allowed.

The last item to be considered by the court is the matter of the defendants counter-claim for rents, telephone bills and gasoline, which the defendant claims were advanced by it on behalf of the plaintiff and for which it was to be reimbursed. The court is of the opinion that this matter is controlled by the written contract between the parties. The court is also of the further opinion that while under the terms of the contract the plaintiff was to bear his own expenses, that these expenses in particular were those in which an exception was warranted in the discretion of of the defendant and where the defendant has given authority to the contrary. This is borne out by the fact that these items were never invoiced to the plaintiff in his monthly statements from the defendant and the fact that they were taken as items of expense in the defendant corporation's income tax returns, as previously set forth in this opinion. It is the opinion of the court therefore that the defendant's counter-claim should be denied.

Judgment may enter for plaintiff in the amount of $2175.08, together with costs and attorney fees to be taxed. No allowance for interest is made because no definite date of demand for payment was shown.

George R. Deneweth,
Circuit Judge.

Dated: October 26, 1961.

NOTICE

Please take notice, that on the 7th day of November, 1961 an Opinion of the Court was entered and filed in this cause.

William F. Brown,
Deputy Clerk of Court.

Dated: November 7, 1961.

To: Letzer & Letzer,
Kenneth N. Kramer,
Attorneys for Plaintiff.

Cass S. Jaros,
Attorney for Defendant.

Copies of foregoing notice mailed to attorneys at their addresses as shown in the file this 7th day of November, 1961.

William F. Brown,
Deputy Clerk of the Court.

CIRCUIT COURT OPINION ON DEFENDANT'S MOTION FOR A NEW TRIAL

(Filed December 15, 1961)

On November 7, 1961, the Court having heard the matter without a jury filed its opinion in the above entitled cause. On November 16, 1961, the defendant filed its motion for a new trial, together with a bill of exceptions to the court's opinion. The motion for a new trial was heard on November 27, 1961, at 10:00 A.M., at which time the arguments of counsel were heard by the court. After listening to the arguments of counsel, the court is of the opinion that the

bill of exceptions filed by the defendant is without merit and that therefore the defendant's motion for a new trial should be denied, for the following reasons:

1. Whether or not the plaintiff had breached his contract with the defendant by failing to give the sixty (60) day notice for termination, as provided in the contract between the parties, is immaterial and was not passed upon by the court, in view of the fact that the plaintiff was suing for work which had been performed by him while the contract was in force, and the defendant had failed to file a counter-claim for any damages it may have sustained by virtue of the plaintiff's failure to give the requisite notice. The court is of the opinion that the notice was not in the nature of a condition precedent to the plaintiff being entitled to recover for work, services performed, pursuant to the contract and while the contract was in force.

2. The contract between the parties provides in part as follows, * * * "we will pay you as a commission of 5% on all orders secured by you and accepted by us" * * * Absolutely no distinction is made between "production orders" and "prototype orders", therefore any attempt on the part of the defendant to prove that the contract makes a distinction between the two types of orders would be an attempt to vary the terms of the written instrument by parol testimony and, therefore, was not considered by the court.

3. After reviewing all of the testimony taken in the case, no subsequent oral agreement modifying the terms of the original written contract has been established by the defendant. Reference is again made to the court's original opinion heretofore filed herein.

4. The court expressly finds that the contract entered into by the plaintiff and the defendant contained but one

provision which provided for variance, namely, the provision concerning the expenses of the plaintiff incurred in the course of soliciting orders for the defendant. The court is of the opinion that pursuant to the opening left in the contract, the plaintiff and the defendant did in fact mutually agree to modify the contract insofar as expenses of the plaintiff in soliciting orders were concerned and did in fact so modify it. The defendant having claimed these items as items of expense on its own income tax returns is a clear indication that the defendant company, as well as the plaintiff, clearly understood that the contract was modified as to these particulars. This is further evidenced by the fact that in all of the defendant's invoices submitted to the plaintiff with his commission checks prior to the time of the termination of his employment no mention was made of a claim for reimbursement on the part of the defendant for expenses incurred.

5. The clear weight of the evidence produced in the case indicates that the plaintiff is entitled to recover for the orders solicited from General Motors Corporation, and no further evidence to the contrary having been presented by the defendant at the time of the argument on the motion for a new trial, the court must reiterate its original finding in this matter.

6. The court has not answered each and every paragraph of the defendant's fifteen paragraph bill of exceptions, because it is of the opinion that the various paragraphs are in many instances duplications of each other and that they constitute nothing more than a statement by the attorneys for the defendant that they disagree in the determination of facts made by the court in this matter; that the objections of the defendant's attorneys to the opinion of the court as contained in defendant's bill of exceptions are sufficiently answered by the opinion as hereinbefore set forth.

Therefore, it follows that the defendant's motion for a new trial should be dismissed and a dismissal may enter in accordance with this opinion.

George R. Deneweth,
Circuit Judge.

A true copy:
Arthur J. Miller, County Clerk,
By Lucille E. Miller, Deputy Clerk.

Dated: December 14, 1961.

NOTICE

Please take notice, that on the 15th day of December, 1961, an opinion of the Court on defendant's motion for a new trial was entered and filed in this cause.

William F. Brown,
Deputy Clerk of Court.

Dated: December 15th, 1961.

To: Letzer & Letzer,
Kenneth N. Kramer, Of Counsel,
Attorneys for Plaintiff.

Jaros & Jaros,
Attorneys for Defendant.

Copies of foregoing notice mailed to attorneys at their addresses as shown in the file this 15th day of December, 1961.

William F. Brown,
Deputy Clerk of the Court.

SUPREME COURT OPINION

(Filed April 6, 1964)

Before the Entire Bench.

Kavanagh, C.J.
Justice Adams took no part in this decision.

Plaintiff sued defendant for unpaid commissions allegedly due plaintiff for services performed under a sales contract with defendant. Defendant filed a cross declaration for reimbursement of expenses, incurred by plaintiff and paid by defendant, the payment of which was allegedly the obligation of plaintiff under said contract. After trial of the case to the circuit court without a jury, the court ordered judgment for plaintiff in substantially the amount claimed and dismissal of defendant's cross claim. From denial of defendant's motion for a new trial on both the declaration and cross declaration, defendant appeals.

On December 5, 1958, the parties executed a contract, effective retroactively from October 30, 1958, which provided for the representation of defendant manufacturing company by plaintiff as a sales engineer. The contract, found by the lower court as controlling the disputed relationship of the parties, contained the following provisions pertinent to issues arising from plaintiff's declaration:

(1) The plaintiff was authorized to solicit orders from any firms except 4 specific firms, among which were Chrysler Engineering Division, Highland Park, Michigan, and Chrysler Missile Operations, Van Dyke, Michigan.

(2) Defendant would pay plaintiff a 5 per cent commission on all orders secured by plaintiff and accepted by defendant, payment of said commission to be made on the first of the month following receipt by defendant of payment for any such orders.

(3) Cancellation of the contract could be effected by either party by written notice to the other party 60 days before cancellation date, and defendant was to pay plaintiff commissions due on all orders accepted before date of cancellation.

The issue raised by defendant's cross declaration, in regard to responsibility of plaintiff's expenses, is governed by the following paragraph of the contract:

> "It is understood your (plaintiff's) expenses shall be your own responsibility. Should you feel any situation warrants an exception, your requests will be given due consideration. Unless we (defendant) have given authority to the contrary on such specific requests, however, we will not assume or pay any of your items of expense."

The last paragraph of the contract provided that no further agreements between the parties would be binding unless in writing.

Pursuant to the contract, plaintiff solicited certain orders and was paid commissions thereon. Because plaintiff's income from these commissions was quite meager for the first few months during which the contract was in effect, defendant established for him a drawing account of $50 per week, chargeable against his commission earnings. The amounts drawn were always deducted from commission payments. Defendant also permitted plaintiff to use office space and telephone and authorized an automobile service station to allow plaintiff to charge gasoline and oil to defendant's account. The expenses incurred in connection with plaintiff's use of office, telephone, gasoline and oil were paid by the defendant and, unlike the drawing account funds, were never deducted from commission earnings nor ever requested to be reimbursed until the filing

of defendant's cross declaration. In fact, the general manager of defendant company testified that reimbursement would not have been requested had plaintiff not instituted this suit.

The purchase orders for which plaintiff was awarded commissions by the trial court were admittedly procured by plaintiff and accepted by defendant during the term of the contract, and the fact that amendments to the purchase orders were later accepted by defendant does not alter the effect of the contract on payment of commissions for procurement of orders accepted within the term.

Plaintiff admits that the orders in question were for "production" items rather than "prototype" items, and that these orders were accepted by defendant with reluctance, caused by the fact that defendant's operational facilities were more suited to the handling of low-volume, high-accuracy "prototype" work than of high-volume, low-accuracy "production" projects. Defendant's general manager testified that this reluctance was overcome "initially" by the desirability of accepting the orders "as a customer service." He further testified that "we were in a position where we couldn't refuse to accept them without jeopardizing our position in future business."

The problem created by this situation is whether the agreement between the parties called for commissions to be paid to plaintiff for such "production" orders. The written contract nowhere classified the orders governed thereby, and, in fact, declared that commissions would be paid on "all orders secured by you [plaintiff] and accepted by us [defendant]." Defendant contends, however, that the written contract should not be construed strictly literally on this point, since, defendant alleges, at the time of execution the parties understood it to mean all "proto-

type" orders, to the exclusion of "production" orders, and that plaintiff was compensated for the orders in question through a later agreement providing for payment of commissions on orders specifically excepted from the written contract, namely, Chrysler Engineering and Chrysler Missile orders.

Plaintiff contends, on the other hand, that the words "all orders" are to be construed literally, because that was the intent of the parties at time of execution and because the contract was drawn by defendant, against whom its wording should, therefore, be construed strictly. Plaintiff further points to the fact that the Chrysler account commissions were first paid to him long before the "production" orders came into controversy, and alleges that the payment of the Chrysler account commissions was rather another attempt by defendant to provide adequate compensation to plaintiff.

On July 18, 1960, plaintiff terminated the contract by sending to defendant written notice thereof, effective immediately. Since the contract provided for 60 days' notice of termination, the premuature termination constituted breach of the contract. Defendant pleaded this breach as a bar to plaintiff's suit. The trial court ruled that since defendant's proper remedy for breach was a claim for damages thereon, the absence of such a claim made the breach immaterial to determination of the issues actually raised. Defendant contends on appeal that the trial court erred in so ruling, and attempts to support this position by citing Jones v. Berkey, 181 Mich. 472, which adopted this general rule (p. 480):

> " 'He who commits the first substantial breach of a contract cannot maintain an action against the other contracting party for a subsequent failure on his part to perform.' "

That case and this Court's other decisions on that point indicates that the words "substantial breach" in the ruling must be given close scrutiny. Such scrutiny discloses that the application of such a rule can be found only in cases where the breach has effected such a change in essential operative elements of the contract that further performance by the other party is thereby rendered ineffective or impossible, such as the causing of a complete failure of consideration (Kunzie v. Nibblelink, 199 Mich. 308) or the prevention of further performance by the other party (Stahelin v. Sowle, 87 Mich. 124).

Since the present case does not involve a contract wherein time is of the essence, the breach found in the sudden termination does not affect an element so essential as to amount to a breach which is contemplated by the rule as "substantial". Therefore, the rule of the Jones Case does not bar the present plaintiff's suit.

Defendant contends further that the trial court erred in denying defendant's cross claim for reimbursement of expenses incurred by plaintiff and paid by defendant. The item of plaintiff's expenses was covered by the contract clause quoted above and repeated for convenience here:

> "It is understood your (plaintiff's) expenses shall be your own responsibility. Should you feel any situation warrants an exception, your requests will be given due consideration. Unless we (defendant) have given authority to the contrary on such specific requests, however, we will not assume or pay any of your items of expense."

The testimony indicates, as stated above, that the items of expense involved were paid by defendant. From the undisputed facts that defendant did not deduct these expenses from plaintiff's commission earnings as it did the drawing account amounts, and that defendant did deduct the ex-

penses on its Federal income tax returns, it could reasonably be inferred that defendant assumed these expenses.

In view of the above-quoted provision of the contract, we think the trial court could properly conclude that defendant, in paying and assuming the expenses, did by those very acts give "authority to the contrary," and thereby relieve plaintiff of the responsibility for payment of the expense items in question. Therefore, the trial court did not err in dismissing defendant's cross claim for reimbursement of these expenses.

In regard to the trial court's determination that defendant is liable for commissions claimed by plaintiff to be due him under the contract, defendant on appeal assigns error to the court's denial of 2 avenues of defense: (1) that the contract terms involved were ambiguous and that, therefore, the intent of the parties at the time of execution, as this intent is shown by the circumstances surrounding execution, should control; and (2) that the written contract was subsequently modified by an oral agreement between the parties.

Defendant correctly contends that where a latent ambiguity exists in a contract, extrinsic evidence is admissible to indicate the actual intent of the parties as an aid to the construction of the contract.

A latent ambiguity is one "where the language employed is clear and intelligible and suggests but a single meaning, but some extrinsic fact or extraneous evidence creates a necessity for interpretation or a choice among 2 or more possible meanings * * *." Black's Law Dictionary, 4th Ed. Since the detection of a latent ambiguity requires a consideration of factors outside the instruction itself, extrinsic evidence is obviously admissible to prove the existence of the ambiguity, as well as to resolve any ambiguity proven to exist.

On this closing argument, at the hearing on his motion for a new trial, and in his argument before this Court, the defendant has contended plaintiff's testimony indicated "unequivocally" that plaintiff understood the contract to cover "protoype" orders only, in accord with defendant's alleged understanding. It is this alleged mutual understanding which defendant claims so conflicts with the literal construction of the contract, which stated "all orders," that the conflict indicates the existence of a latent ambiguity. In his opinion on the motion for a new trial, the trial court indicated that he found no such ambiguity, presumably because he found plaintiff's testimony not so unequivocally in agreement with defendant's in regard to the meaning of the term "all orders". We think such a finding of fact could reasonably have been made from the testimony adduced. Since the trial court reasonably exercised its discretion in finding that no ambiguity existed, there was no error in the trial court's ignoring of the testimony introduced to solve the nonexistent ambiguity.

In defense to its claimed liability, defendant also affirmatively offered proofs of the existence of a subsequent oral agreement modifying the written contract. In his written opinion after trial, the court ruled that defendant had not sustained its burden of proving the existence of the oral contract. The insufficiency found by the court was, however, in regard to the proof of the consideration necessary for the existence of the oral contract. This Court has held that proof of consideration for a subsequent oral agreement allegedly modifying a written contract is not necessary, because "if the parties considered it to their advantage to depart from strict performance of the agreement, that would constitute a sufficient consideration." Jacob v. Cummings, 213 Mich 373, 378. Therefore, the trial court denied the existence of the oral agreement for an erroneous reason.

The trial court did not make a finding, however, as to whether the defendant sustained its burden of proof of the element which must be proved to establish the existence of the oral agreement, namely, mutual assent. This Court, in reviewing controverted issues of fact in a law case tried without a jury, does not consider the case *de novo* as if it were in equity. Schneider v. Pomerville, 348 Mich 49. Accordingly, following to some extent the Schneider Case provision for remand, this case is remanded to the circuit court for determination, by supplemental opinion to be filed, on the record as already established, of the essential question of whether defendant sustained its burden of proof as to the existence of the oral contract. "In exceptional cases brought here under Court Rule No. 64 [1945], and this case is deemed such an exception, we may remand for essential determination of unsettled or overlooked questions of fact." Schneider v. Pomerville, *supra*, pp. 58, 59.

The judgment of the lower court is affirmed in its dismissal of defendant's cross claim. The case is remanded only for the determination indicated above. GCR 1963, 810.

Costs of this Court, and of the trial court, will be taxed according to the final result.

CIRCUIT COURT SUPPLEMENTAL OPINION

This matter was referred back to this court by the Supreme Court of Michigan by an Opinion filed April 6, 1964 written by Chief Justice Kavanagh, for the express purpose of making a finding as to whether the defendant had sustained its burden of proof of the essential element of defendant's claim of the existence of a subsequent oral agreement, namely, mutual assent (reference is made to the aforesaid opinion for a more detailed analysis).

The court, pursuant to said instruction, has carefully considered the record and based upon such consideration finds as a matter of fact that the defendant has not sustained its burden of proof in establishing the subsequent oral agreement. A careful review of the testimony would indicate that the claim of assent to a subsequent oral agreement by the plaintiff is made by Mr. Wally Kozlowske, Vice President and General Manager of the defendant company. Assent to this same oral agreement was expressly denied by plaintiff McCarty in his testimony. There is nothing here but the simple case of an assertion by one party to the contract that it was assented to, and a flat denial by the other. In the court's opinion, the very best that can be said for the defendant's case is that the proofs are equally balanced, and since the defendant has the burden of proof, its burden has not been sustained. Therefore, the court finds no subsequent oral agreement as alleged by the defendant.

George R. Deneweth,
Macomb County Circuit Judge.

Dated: August 5, 1964.

CC: Hon. Thomas J. Kavanagh, Chief Justice,
Michigan Supreme Court, Lansing, Michigan.

Mr. Kenneth N. Kramer,
Attorney at Law, 73 Cass Ave., Mt. Clemens.

Mr. Cass S. Jaros and Marjorie S. Jaros,
Attorneys at Law, Suite 1320, One Woodward Ave.,
Detroit.

ORDER EXTENDING TIME FOR SETTLEMENT OF CONCISE STATEMENT OF FACTS AND RECORD INCIDENT TO AN APPLICATION FOR LEAVE TO APPEAL

At a session of said Court, held in the Court House, in the City of Mount Clemens, County of Macomb, State of Michigan, on the 24th day of August, 1964.

Present: Honorable George Deneweth, Circuit Judge.

On motion of Cass S. Jaros, attorney for defendant and appellant,

It is hereby ordered that the time for settlement of the concise statement of facts and record incident to an application for leave to appeal shall be, and the same is hereby extended to September 24, 1964.

George R. Deneweth,
Circuit Judge.

SUPREME COURT OPINION ON REMAND

(Filed September 2, 1964)

Before the Entire Bench.
Kavanagh, C.J.

Under date of August 5, 1964, pursuant to remand, the trial court made a determination as a matter of fact from conflicting testimony that defendant had not sustained its burden of proof as to the subsequent oral agreement. Since the evidence in this, a law case tried to the court without a jury, does not preponderate against that finding, we will not disturb it. Firemen's Insurance Co. v. Sterling Coal Co., 384 Mich. 564; In re Karch's Estate, 311 Mich. 158.

The judgment of the lower court is affirmed in the entirety. Plaintiff shall have costs.

SUPREME COURT ORDER GRANTING EXTENSION OF TIME TO APPLY FOR REHEARING

At a session of the Supreme Court of the State of Michigan, held at the Supreme Court Room, in the Capitol, in the City of Lansing, on the 23rd day of September in the year of our Lord one thousand nine hundred and sixty-four.

Present the Honorable Thomas M. Kavanagh, Chief Justice, John R. Dethmers, Harry F. Kelly, Eugene F. Black, Theodore Souris, Otis M. Smith, Michael D. O'Hara, Paul L. Adams, Associate Justices.

On order of the Chief Justice, appellant's motion for an extension of two weeks from September 22, 1964, in which to file its application for rehearing, having been consented to, is granted.

State of Michigan—ss.

I, Donald F. Winters, Clerk of the Supreme Court of the State of Michigan, do hereby certify that the foregoing is a true and correct copy of an order entered in said court in said cause; that I have compared the same with the original, and that it is a true transcript therefrom, and the whole of said original order.

In testimony whereof, I have hereunto set my hand and affixed the seal of said Supreme Court at Lansing, this 25th day of September in the year of our Lord one thousand nine hundred and sixty-four.

Donald F. Winters,
Clerk.

(Seal)

SUPREME COURT ORDER DENYING APPLICATION FOR REHEARING

At a session of the Supreme Court of the State of Michigan, held at the Supreme Court Room, in the Capitol, in the City of Lansing, on the 2nd day of November in the year of our Lord one thousand nine hundred and sixty-four.

Present the Honorable Thomas M. Kavanagh, Chief Justice, John R. Dethmers, Harry F. Kelly, Eugene F. Black, Theodore Souris, Otis M. Smith, Michael D. O'Hara, Paul L. Adams, Associate Justices.

In this cause an Application for Rehearing have been submitted, it is hereby DENIED.

State of Michigan—ss.

I, Donald F. Winters, Clerk of the Supreme Court of the State of Michigan, do hereby certify that the foregoing is a true and correct copy of an order entered in said court in said cause; that I have compared the same with the original, and that it is a true transcript therefrom, and the whole of said original order.

In testimony whereof, I have hereunto set my hand and affixed the seal of said Supreme Court at Lansing, this 5th day of November in the year of our Lord one thousand nine hundred and sixty-four.

Donald F. Winters,
Clerk.

(Seal)